Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

October 1 to December 31, 2007

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Production Summary

- The active inventory totalled 4,651 cases (16% over the target of 4,000). This number is an encouraging reduction from the previous quarter result of 4,955 cases.

- Incoming appeals numbered 979 and of these, 832 were appeals from WSIB decisions and 147 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 796 new appeals and 143 reactivated appeals recorded in the third quarter of 2007.
  - In the 4th quarter of 2006 the Tribunal recorded 846 new appeals and 162 re-activations.
  - In 2006, the weekly average of hearing ready appellants was 64. For Q4 2007, the weekly average of hearing ready appellants is 52. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,219; this includes 427 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 792 after hearing dispositions; of the after hearing dispositions, 761 followed from Tribunal decisions.

- The inactive inventory decreased by 6 cases to 4,066 (at the end of Q3-07, the inactive inventory was 4072 cases).

- In Q4 2007, 87% of final decisions were released within 120 days. In 2006, 81% of final decisions were released within 120 days.

- The Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. Recent appointments and re-appointments have enabled an increase in the hearing schedule to address the volume of cases.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the fourth quarter of 2007, the notice inventory included 1,358 dormant cases, the active inventory totaled 4,651 cases, and the inactive inventory totaled 4,066 cases.

tion Charts

Product

Inventory

A. Active

	Active Inventory
Period	5377
Q3-2005	5287
Q4-2005	5318
Q1-2006	5416
Q2-2006	5493
Q3-2006	5228
Q4-2006	5172
Q1-2007	5045
Q2-2007	4955
Q3-2007	4651
Q4-2007	

ing Appeals

B. Incomi

	Incoming Appeals
Period	1056
Q3-2005	1100
Q4-2005	1144
Q1-2006	1124
Q2-2006	1087
Q3-2006	1008
Q4-2006	1026
Q1-2007	950
Q2-2007	939
Q3-2007	979
Q4-2007	

sitions

C. Dispos

	Dispositions – total	Pre-hearing	After Hearing
Period	1016	479	537
Q3-2005	1190	466	724
Q4-2005	1146	435	711
Q1-2006	1131	477	654
Q2-2006	1083	426	657
Q3-2006	1161	362	799
Q4-2006	1149	383	766
Q1-2007	1133	367	766
Q2-2007	1032	371	661
Q3-2007	1219	427	792
Q4-2007			

D. Inactive Inventory

Period	Inactive Inventory
Q3-2005	4237
Q4-2005	4286
Q1-2006	4309
Q2-2006	4349
Q3-2006	4302
Q4-2006	4234
Q1-2007	4118
Q2-2007	4108
Q3-2007	4072
Q4-2007	4066

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33
Q2-2006	1381	-105
Q3-2006	1308	-73
Q4-2006	1420	112
Q1-2007	1353	-67
Q2-2007	1297	-56
Q3-2007	1294	-3
Q4-2007	1358	64

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Community Activities

Carole Prest, Tribunal Counsel to the Chair, was the recipient of the 2007 SOAR (Society of Ontario Adjudicators and Regulators) Medal at the SOAR Medal Dinner held on November 1, 2007. The SOAR medal is awarded annually to those individuals who have made an outstanding contribution to the administrative justice community. Throughout her career, Ms. Prest has been an active member of SOAR. She co-chaired SOAR's Rules of Practice Committee and co-authored Ontario Rules – A Model for Administrative Justice Agencies. She also served on SOAR's SPPA Working Group and the SOAR/Attorney General Joint Committee on rules. In addition, she coordinated SOAR's response to the Agency Reform Commission. Ms. Prest has taught administrative law to new appointees, participated in SOAR's effective decision-writing seminars and assisted in planning several COBA conferences.

In September, Tribunal Vice-Chair Bernard Kalvin and Associate Counsel to the Chair, Ann Somerville taught a session on decision-writing at the SOAR adjudicator's training course.

In October, special projects counsels Garth Dee and Susan Adams presented on the Right to Sue, at a Continuing Legal Education tele-seminar organized by the Law Society of Upper Canada.

Associate Counsel to the Chair Ann Somerville chaired a panel on paralegal regulation at the COBA conference in Toronto in November. The session was entitled "Paralegals – Making the Legislation Work on the Ground."

Also in November, Garth Dee and Gillian Shaw, a lawyer with the Tribunal Counsel Office, took part in a Lancaster House presentation in Toronto. Mr. Dee provided an update on legislative changes that came into effect on July 1, 2007 and Ms. Shaw participated in a panel that discussed occupational disease.

Volume 81 of the WSIAT Reporter was posted on the website during this period.

Keep up to date with Tribunal news using an RSS feed! The Tribunal's web site is www.wsiat.on.ca; instructions are located at the bottom of the home page.

Judicial Review Activity

e fourth quarter
The status of applications for judicial review involving the Tribunal for the
of 2007, as well as the status of other proceedings, is set out below.

ring the quarter
Only those judicial reviews where there was some significant activity durvere received
are listed. There are a number of other pending judicial reviews which wg this particular
after the completion of this quarter, or for which no action occurred durin
quarter.

Judicial Reviews

2000)
1. *Decisions Nos. 433/99* (June 24, 1999) and *433/99R* (May 30, 2

here were no
A worker had a back injury in April 1979. From 1979 until 1990, t In late 1991 he
records of any back complaints in the Applicant's medical charts. Board that his
suffered from an episode of back pain. In 1993 he alleged to the A report from
back problems were related to the 1979 accident 14 years earlier. the problems.
the worker's specialist supported a link between the accident and atibility and
The issue for the Vice-Chair was one of medical continuity, compnot cause or
causation. The Vice-Chair concluded that the 1979 accident did r
contribute to the symptoms after 1990, and denied entitlement.

Divisional Court
The judicial review was heard in Sudbury on October 5 2006. A Dber 15 the
panel of Smith, Kent and Pierce reserved its decision. On Novemudicial review
Divisional Court released its decision granting the application for j
and quashing *Decisions Nos. 433/99* and *433/99R*.

t finding which,
The Court held that there were several errors in the Tribunal's face errors was at
although taken individually were small, the cumulative effect of thandard of review
odds with the Tribunal's conclusion. While acknowledging the staindings of fact
was patent unreasonableness, the Court held that the Tribunal's froneous fact
were erroneous, and a rational conclusion cannot be based on er
finding.

ourt of Appeal
The Tribunal filed a Notice of Motion for Leave to Appeal. The Cand Killeen).
granted Leave to Appeal on May 31, 2007 (Rosenberg, Rouleau a
This case will be heard by the Court of Appeal in February 2008.

2. ***Decision No. 855/03*** **(November 15, 2005)**

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury. The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Board successfully brought a motion to intervene in the judicial review. The judicial review was heard on June 27, 2007.

The Divisional Court Panel of Jennings, Swinton and Lederman released its decision on September 10, 2007. The majority of the Panel, consisting of Justices Jennings and Lederman, held the Tribunal's decision was patently unreasonable because it failed to consider evidence of legislative history which were contained in submissions made to the Tribunal Vice-Chair. They ruled the decision should be referred back to the Tribunal for a re-hearing in accordance with the findings of the majority.

In her dissenting reasons, Justice Swinton held that a failure to refer to legislative history did not render the Tribunal's decision patently unreasonable. She noted this had not been raised before the Board, and was not a major issue referred to in other submissions, and moreover a failure to refer to certain evidence is not necessarily fatal to the decision of an administrative tribunal. Justice Swinton also observed that legislative history plays a limited role in the interpretation of legislation because of concern about its reliability. She held that the Tribunal's conclusion in this case was within its specialized expertise.

The Tribunal filed a notice of motion for leave to appeal to the Court of Appeal. At the end of the quarter a decision on the Leave application was pending.

3. ***Decisions Nos. 172/02I* (February 28, 2002), *172/02* (September 22, 2003) and *172/02R* (June 30, 2004)**

In January 1995 a worker injured his elbow and back. He received total disability benefits from the date of the accident until early 1996, when his benefits were terminated for failing to accept suitable work. The Board reinstated his wage loss benefits effective December 2001, and awarded a 100% future economic loss award in April 2003.

The worker appealed to the Tribunal for entitlement for a psychotraumatic disability and for wage loss benefits from February 1996 to December 2001. In *Decision 172/02* the Vice-Chair granted entitlement for a psychotraumatic disability, but found the worker was not totally disabled until July 1999. The worker's application to reconsider was granted in part in *Decision 172/02R*, allowing the temporary total disability benefits to be further backdated to September 9, 1998. A further request to reconsider for the period benefits was dismissed.

The worker commenced an application for judicial review. The case was heard on October 25 by a Divisional Court Panel of Swinton, Lane and Kitely. The Court reserved its decision. As of the end of 2007 the judgement had not been released.

4. ***Decisions Nos. 167/06* (March 9, 2006) and *167/06R* (December 14, 2006)**

The worker's appeal for chronic pain entitlement was denied by the Tribunal. The worker's family doctor had submitted a report suggesting the worker was a malingerer. The Vice-Chair relied on the letter as part of the evidence he considered in denying the appeal

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings with the Court. At the end of the quarter the Tribunal was waiting to receive the worker's factum.

5. ***Decision Nos. 1971/00* (January 24, 2001), *1971/00R* (December 11, 2001), and *1971/00R2* (April 24 2007); and *Decision Nos. 1357/03I* (September 26, 2003), *1357/03* (November 19, 2004), and *1357/03R* (April 20, 2007)**

This application for judicial review, involving six decisions for the same worker, has recently been received. The nature of the application for judicial review is unclear.

The Tribunal filed its Record of Proceedings and at the end of the quarter was waiting for the worker's factum.

6. ***Decision 1509/02*** **(February 2, 2004) and** ***Decision 1509/02R*** **(September 27, 2006)**

Two sisters were suspended at the same time for smoking in a non-smoking area at work. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (*Decision 1384/03*). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (*Decision 1509/02*). Sister #2 also brought an application for judicial review.

Following the release of the Divisional Court decision for Sister #1, Sister #2 decided to adjourn the judicial review, to permit her counsel to file an application for reconsideration with the Tribunal. The Tribunal consented to the adjournment.

The basis of the reconsideration application was that the Panel had failed to consider the worker's alternative argument that entitlement could have been granted on the basis of a recurrence. The reconsideration was denied by a different Vice-Chair in *Decision 1509/02R*, on the grounds that the worker had failed to explicitly appeal the recurrence issue to the Tribunal. However, the Vice-Chair also noted that there was a final decision of the Board on the recurrence issue, and it was open to the worker to bring a time extension application should she still wish to pursue that issue at the Tribunal.

Following the release of *Decision 1509/02R*, the worker retained new counsel. Her new counsel filed a time extension application. In *Decision 2021/07E*, released during this quarter, the request for a time extension was denied.

At the end of the quarter the judicial review application was still pending.

7. ***Decision 1118/07* (June 14, 2007)**

The plaintiff was allegedly injured while employed at a nuclear generating station. He brought an action. The defendant's application to the Tribunal for an order taking away the plaintiff's right to sue was granted. The Vice-Chair found the fact the employer may be a federal undertaking did not take away the Tribunal's jurisdiction. The Nuclear Liability Act did not limit the right to claim compensation.

The plaintiff commenced an application for judicial review. At the end of the quarter the Tribunal was in the process of preparing its record of proceedings.

8. ***Decision 1022/02* (December 9, 2003), *Decision 1022/02R* (August 18, 2004), *Decision 1022/02R2* (November 1, 2005), and *Decision 1022/02R3* (October 3, 2007)**

Decision 1022/02 denied the worker entitlement for benefits for a bi-lateral shoulder and related left elbow condition. The worker claimed the condition resulted from a disablement injury that occurred in the course of his employment. The worker subsequently retained another representative, who requested that the Tribunal reopen *Decision 1022/02* on the basis that there were errors in the Tribunal's process.

In *Decision 1022/02R*, the original Vice-Chair denied the reconsideration request. Counsel for the applicant initially commenced an application for judicial review. He then decided to adjourn the judicial review to pursue a further reconsideration application at the Tribunal. In the second reconsideration request, a different Vice-Chair decided that *Decision 1022/02* should be re-opened. The second Vice-Chair found that a defect in the Tribunal's process occurred at the outset of the hearing of the worker's appeal, in that the worker and his previous counsel were not of one mind on the question of whether the worker required a translator. While acknowledging the substantial inconvenience to the parties, the second Vice-Chair held the hearing ought to have been adjourned to enable the worker and his counsel to rectify the lack of communication. As the threshold for reconsideration had been satisfied, it was directed that the appeal be reheard.

In May 2007 the Tribunal was served with a notice that the judicial review had been abandoned.

The appeal was reheard by the Tribunal. The worker withdrew the appeal for elbow entitlement. *Decision 1022/02R3* granted the worker entitlement for the bi-lateral shoulder condition.

Other Proceedings

Human Rights Complaint

An injured worker appealed for entitlement for traumatic mental stress on the basis of alleged sexual harassment by his supervisor. A three person Panel denied the appeal. The worker filed a complaint with the Human Rights Commission, alleging discrimination by the Tribunal and the Panel members on the grounds of disability. It was apparent that the worker's main complaint was that he did not agree with the decision, and wanted the Commission to change it.

The Tribunal filed an Answer with the Commission, arguing that the Commission should not deal with the Complaint under s.34 of the Code on the grounds that the Commission had no jurisdiction to overturn a Tribunal decision, and alternatively that the complaint was frivolous and vexatious.

Commission staff recommended that the Commission not deal with this complaint. Chief Commissioner Barbara Hall accepted the recommendation of Commission staff and the Tribunal's submissions, and decided not to deal with the complaint. She found that the matter was more appropriately dealt with under the *WSIA*, that the complaint did not provide a link between the grounds alleged and the alleged discriminatory behaviour, and that the complaint was vexatious.

Highlights of Recent Decisions

Occupational Disease

Decision No. 2408/05 **(Moore, Meslin, Timms)** found that a worker's cancer did not arise from his occupational exposure and work for a nickel mining company. Epidemiological evidence did not show any increased risk of bladder cancer among nickel mine workers except for sinter plant workers with more than five years exposure. The panel concluded that the worker's 7 months of exposure was not a likely causal factor in the development of his cancer condition, that there was no evidentiary link between the asbestos and bladder cancer, and that the worker's exposure to diesel fumes was not sufficient to increase his risk of developing cancer. The worker had a 34 pack year history of smoking, he consumed a significant amount of alcohol for many years, and these activities continued after the worker retired. The panel found that evidence of non-occupational factors established a clear elevation of risk for developing bladder cancer.

Decision No. 1622/07 **(Keil, Tracey, Crocker)** dismissed the worker's claim for entitlement to lung cancer and coronary artery disease arising from his work with a municipality from 1964-1993, as a road maintenance, front end loader operator, billboard painter and service man. During summer months, he did road work using a heater/burner/planer and was exposed to asphalt, coal, tar pitches and diesel fumes. The Panel found that an epidemiological study of lung cancer in asphalt and road paving workers in Europe did not support a finding of work relatedness. The worker in this case had a long smoking history. The Panel concluded that the evidence did not support a causal relationship between asphalt work and the development of the lung cancer. The worker also did not have entitlement for his heart condition. The worker had non-compensable risk factors, including smoking, weight, diabetes, age and gender, and no medical opinion linked the heart condition to the worker's work.

Appeals Where the Worker is Deceased

Decision No. 2587/06I **(Martel, Wheeler, Crocker)** outlines the procedure at the Tribunal when a claim is pursued by an estate. The Tribunal often determines who has authority to act for the worker's estate for the purposes of Tribunal proceedings. Where there is a will, the Tribunal generally accepts that the trustee has authority to act for the estate. In the absence of a will, the Tribunal will not require the applicant to obtain a Certificate of Appointment of Estate Without a Will (formerly known as Letters of Administration), if all the immediate beneficiaries of the estate consent to the applicant bringing the appeal on behalf of the estate. In determining likely beneficiaries, the Tribunal will have regard to applicable intestacy legislation. Where a person dies intestate movable property is governed by the law of the usual residence of the deceased while real property is governed by the law of the jurisdiction where the real property is situated. In this case, however, it was uncertain where the worker resided at the time of her death and whether the worker had assets and, if so, where they were located. It was unclear whether there was a valid holograph (handwritten) will or whether the worker died intestate. The determination of the validity of the holograph will was not within the expertise of the Tribunal. Accordingly, in the unique circumstances of this case, the appeal did not proceed until there was a court appointed representative of the estate.

Lynn Telalidis
January 2008